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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re GARY P. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. GARY S., Defendant and Appellant.	C044151 (Super. Ct. Nos. JD218874, JD218875)

Gary S., father of the minors, appeals from the judgment of disposition adjudging the minors dependents. (Welf. & Inst. Code, §§ 358, 395 [further undesignated statutory references are to this code].) Appellant contends the petition failed to state facts sufficient to support jurisdiction and also that the evidence was insufficient to support the jurisdictional findings, the order removing the minors from his custody, the order for supervised visits and the plan requirement for random tests.

Further, appellant argues the court failed to make necessary findings prior to the removal order. We affirm.

FACTS

The Department of Health and Human Services (DHHS) removed the minors, Breanna, age nine; and Gary, age ten; and their half-sibling, from appellant's home in December 2002 based upon allegations of recent domestic violence perpetrated by appellant and of appellant's alcohol abuse which led to domestic violence. Appellant was not living in the home at the time. The minors were sent to live with appellant in June 2002 to remove them from the ongoing domestic violence in the mother's home in Colorado.

Various reports and interviews established the following facts. Appellant's wife, the minors' stepmother, acknowledged appellant was present in the home the day the minors were removed despite a restraining order which issued after his last attack on her in November 2002. The stepmother admitted she did not intend to enforce the restraining order. The stepmother further stated that appellant was a heavy drinker and that drinking often preceded his bouts of domestic violence but blamed herself for his physically and sexually assaultive behavior. She also said that the minors were sent to their room with earplugs so they would not hear the fighting but that the minors were present during at least the end of the last incident in November 2002. She did not believe the minors were at risk of physical harm from appellant but agreed there was an emotional effect on them.

When interviewed, appellant denied perpetrating domestic violence on the stepmother, insisting the reports of his violence

and his arrests for spousal abuse were due to the stepmother's problems and coercion by her relatives. He explained he was at the home because he thought the restraining order had been dropped and insisted that providing earplugs to the minors was a joke. Appellant stated his prior driving under the influence (DUI) conviction was also the stepmother's fault and that he only drank three to four beers a day on weekends, which was his right because he worked hard.

The minors stated the earplugs were no joke, there was frequent fighting in the home and both thought that appellant needed help and counseling for his fighting and arguing. Gary said it was scary living with appellant and his stepmother. The half-sibling also reported ongoing domestic violence and wished it would stop.

The sheriff's deputy who arrested appellant in November 2002 for domestic violence stated appellant was very violent during the arrest and that the stepmother told him appellant used sodomy as a form of punishment. Additional police reports provided a history of reports of appellant's domestic violence from April 1999 to November 2002. The social worker's investigation disclosed appellant's DUI conviction in May 1999.

By January 2003, both appellant and stepmother were referred to various services. Both showed some initial reluctance to participate. However, by the end of January, appellant had begun to attend some services while still denying that domestic violence in the home posed a risk to the minors. Appellant provided only two tests during January, both negative, although

he had agreed to test three times a week. The social worker also reported that a physical examination of Breanna disclosed evidence of healed hymeneal trauma consistent with suspected sexual abuse. However, the minor did not disclose any sexual abuse when interviewed.

At the contested jurisdictional hearing in April 2003, the court ordered the original petition superseded by a second amended petition. In relevant part, the second amended petition alleged, pursuant to section 300, subdivision (b): "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness [¶] [1] as a result of the failure or inability of his or her parent . . . to supervise or protect the child adequately [¶] . . . [¶] [2] by the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse. [¶] . . . [¶]

"b-2 The child's father, Gary S[.], has a substance abuse problem from which he has failed and/or refused to rehabilitate which renders him incapable of providing adequate care and supervision of the child, in that on or about May of 1999, the father was convicted of Driving under the Influence of Alcohol. The child's sibling, Morgan J., was in the car at the time of the father's arrest. In addition, the father currently consumes excessive amounts of alcohol, which often result in incidents of

domestic violence when the child and the child's siblings are present."[1]

At the jurisdictional hearing, the social worker provided an oral update that appellant had tested negative three times a week for the last three months, was participating in counseling and anger management classes and was attending three Alcoholics Anonymous meetings a week. However, the testing was not random, as appellant tested Mondays, Wednesdays and Fridays. Appellant also had supervised visitation with the minors and completed a parenting class.

Appellant submitted the petition on the reports, arguing the evidence did not support a finding of jurisdiction because he did not have a current substance abuse problem. Appellant further argued the pleading did not include all the facts upon which DHHS relied in their argument. The court agreed with appellant that the 1999 DUI conviction alone was inadequate to show he currently had an alcohol abuse problem and had failed to rehabilitate from it. However, the court found clear evidence that the domestic violence and assaultive behavior did involve the use and/or abuse

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[1] The amended petition contained additional allegations including b-1, alleging the history of domestic violence in appellant's home; b-3, alleging the ongoing domestic violence in the mother's home; b-4 alleging failure to protect Breanna from sexual abuse; and d-1 alleging either sexual abuse or risk of sexual abuse of Breanna by a member of the household or failure to protect the minor from sexual abuse. On the motion of DHHS, the section 300, subdivision (d) allegations were dismissed at the contested jurisdictional hearing and DHHS limited its argument to the b-2 allegation. It is unclear whether the court sustained the b-4 allegation.

of alcohol. The court noted appellant's current participation in services but stated that the recent efforts were inadequate to show appellant no longer had an alcohol problem since the problem was long-standing. The court also recognized appellant had been testing negatively but observed that appellant knew well in advance when he would be tested and had yet to demonstrate he had control over his alcohol use.

The court sustained the petition and adopted the recommended disposition orders and reunification plan. At appellant's request, the court ordered random testing as a part of the reunification plan.

DISCUSSION

I

Appellant contends the allegations of the petition do not state a basis for jurisdiction.

In *In re Alysha S.* (1996) 51 Cal.App.4th 393, this court, relying on our earlier decision in *In re Fred J.* (1979) 89 Cal.App.3d 168, 176 and footnote 4, observed that a challenge "akin" to a demurrer was available in a dependency action to test the sufficiency of the allegations in the petition. (*In re Alysha S.*, *supra*, 51 Cal.App.4th at p. 397.) We then, drawing an analogy to the civil law, concluded that such a claim relating to the sufficiency of the petition to state a basis for a dependency proceeding was also not waived on appeal from the judgment of disposition even if not previously raised. (*Ibid.*)

To satisfy the notice component of due process, the petition must contain a concise statement of facts which connect the

statutory language to the case at issue. (§ 332, subd. (f); *In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397; *In re Stephen W.* (1990) 221 Cal.App.3d 629, 640.) We construe well-pleaded facts in favor of the petition to determine if DHHS has stated a basis for dependency jurisdiction. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "This does not require the pleader to regurgitate the contents of the social worker's report into a petition, it merely requires the pleading of essential facts establishing *at least one ground* of juvenile court jurisdiction." (*In re Alysha S.*, *supra*, 51 Cal.App.4th at pp. 399-400, emphasis added.)

The petition alleges the statutory criteria for jurisdiction under section 300, subdivision (b), that the minors are at substantial risk of physical harm due to appellant's inability to supervise or protect the minor and appellant's inability to provide regular care as a result of his substance abuse. The supporting facts alleged are that: (1) appellant has a substance abuse problem dating from at least 1999 and from which he has yet to rehabilitate, as he currently consumes excessive alcohol; (2) his substance abuse problem affects his ability to provide adequate care and supervision of the minors as demonstrated by one occasion in 1999 when he was driving with the minors' half-sibling in the car and was arrested and convicted of DUI; and (3) appellant's alcohol abuse often results in domestic violence episodes when the child and the child's siblings are present.

The Legislature has recognized that, in general, substance abuse has a negative effect on the home environment and the

safety of children living in such an environment. (§ 300.2.) Here it is alleged substance abuse is closely coupled with domestic violence in the presence of the minors, appellant continues to drink to excess, and his substance abuse has placed a child at risk in the past. These allegations are adequate to put appellant on notice that his ongoing and untreated substance abuse creates situations which put the minors at substantial risk of serious physical harm either through their presence during domestic violence incidents or through his lack of judgment while under the influence of alcohol. Accordingly, the petition alleges sufficient facts to support jurisdiction under section 300, subdivision (b).

II

Appellant attacks the sufficiency of the evidence to support the juvenile court's finding that jurisdiction existed, the order removing the minors from parental custody, the order for supervised visits, and the requirement for random tests.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, all conflicts are to be resolved in favor of the prevailing party and issues of fact and credibility are questions for the trier of fact. (*In re*

Jason L., *supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

a. *Jurisdiction*

Several theories to support jurisdiction were alleged. However, we need find only one ground is supported by substantial evidence to affirm the juvenile court's exercise of jurisdiction. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112-113.) "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, emphasis omitted.)

Ample evidence shows the minors were at substantial risk of physical harm pursuant to section 300, subdivision (b), at the time of the hearing.

The evidence in the reports showed appellant had a long-term problem with alcohol abuse, resulting in at least one arrest and a conviction for DUI. At the time, his judgment was sufficiently impaired that he placed the minors' half-sibling at risk of physical harm because he had her in the car with him. The stepmother said appellant drank to excess and his drinking led to domestic violence. She also said the children were physically present during the last serious incident a month before the minors were removed. The minors said they were directed to use earplugs and go to their room when fighting between the adults in

the home occurred, but it was clear that they were not insulated from the violence. At the time the minors were placed in protective custody, appellant failed to take responsibility either for his substance abuse or for his prior conduct resulting in his arrests for domestic violence and substance abuse, instead blaming the stepmother for his own bad conduct. Even the minors recognized appellant was out of line. It is true, during the four months between the time the minors were removed and the jurisdictional hearing, appellant had begun to participate in services and, evidently, was doing well. However, during this time, he was not subject to the strains of family living and had no opportunity to engage in domestic violence. Also, appellant's brief treatment period was inadequate to demonstrate he was now sober after his years of alcohol abuse and there still was no indication he had begun to take responsibility for his actions. The minors had been at substantial risk of physical harm while in appellant's care and remained at risk until his participation in services wrought a change in his behavior and attitude.

b. *Removal*

To support an order removing a child from parental custody, the court must find clear and convincing evidence "[t]here is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor or would be if the minor were returned home . . . ." (§ 361, subd. (c)(1).)

The evidence which supported the jurisdictional finding also supported the court's decision to remove the minors. Until appellant had benefited from services there was a substantial

danger to the minors' physical and emotional well-being in appellant's custody.

c. *Supervised Visits*

The juvenile court has the power and responsibility to define visitation rights with a child who has been removed from parental custody. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1373.) "In order to maintain ties between the parent . . . and the child, and to provide information relevant to deciding if, and when, to return a child to the custody of his or her parent[,]" visitation must be "as frequent as possible consistent with the well-being of the child." (§ 362.1, subd. (a)(1)(A).) However, "[n]o visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(B).)

As we have seen, the evidence established appellant continued to present a risk to the minors who had been repeatedly traumatized by the domestic violence of their parents. Because appellant had not yet made significant progress in coming to grips with and improving his bad conduct which led to removal, unsupervised visitation would have jeopardized the safety of the minors. The evidence supported the juvenile court's exercise of discretion to require supervised visitation.

d. *Random Tests*

As appellant requested random tests more clearly to demonstrate to the court his commitment to sobriety, he cannot complain that the court granted his request.

III

Appellant contends the court erred in failing to make a finding there was "no reasonable alternatives to removal," however, the discussion also includes a contention the court failed to make a determination reasonable efforts had been made to prevent removal of the minors.

In addition to finding clear and convincing evidence to support an order removing a child from parental custody, the court must also (1) find "there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parents' . . . physical custody" (§ 361, subd. (c)(1)); (2) "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor" and (3) "state the facts on which the decision to remove the minor is based." (§ 361, subd. (d).) Failure to state facts justifying removal will be deemed harmless absent a reasonable probability that the factual findings, if made, would be in favor of continued custody. (*In re Jason L, supra,* (1990) 222 Cal.App.3d 1206, 1218.)

The court did make the required findings and stated a basis for removal at the detention hearing when ordering the minors removed from the home.

By the dispositional hearing, appellant had been participating in a panoply of services designed to address the problems which led to removal. There was no suggestion that these efforts were not reasonable.

Until appellant's progress in services could be demonstrated over time, the court made clear the necessity for removal remained. Due to the nature of the problems which led to removal, absent 24-hour, in-home monitoring, there was no alternative to removal of the minors if they were to remain safe. Such close monitoring is, of course, not reasonable.

The court stated the allegations of the second amended petition constituted the facts supporting its findings. Failure to make more extensive factual findings or, specifically, to state the ongoing services constituted reasonable efforts to prevent removal, in the absence of objection, was harmless. (*In re Jason L., supra,* 222 Cal.App.3d at p. 1218.)

DISPOSITION

The judgment of disposition is affirmed.

NICHOLSON, Acting P.J.

We concur:

RAYE, J.

HULL, J.